FILED
MAY 25 1954
819
HAROLD S. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. [redacted] 93

GEORGE SCHMIDT,

Petitioner,

vs.

THE READER'S DIGEST ASSOCIATION, INC.

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Seventh Circuit.

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REPORT OF OPINIONS.

A combined opinion of the Court of Appeals covers this case and its two companion cases.

Schmidt v. *Esquire, Inc.*
Schmidt v. *Reader's Digest Association, Inc.*
Schmidt v. *Crowell-Collier Publishing Company*
210 ~~U.S.~~ 908, 914, R. 75.
F. 2d

JURISDICTION.

Judgment in this civil case was entered in the Court of Appeals February 24, 1954. (R. 87). Jurisdiction is based on 28 U.S.C.A. 1254 and 2101.

QUESTIONS PRESENTED FOR REVIEW.

This and the other two companion cases above cited were decided in one opinion of the Court of Appeals and these three petitions are presented together. The Crowell-Collier petition is treated as the major petition, with this Reader's Digest petition and the Esquire petition in shorter form and covering only the questions peculiar to them.

Diversity jurisdiction is not involved in this *Reader's Digest* case, however, and there is no motion to remand, because, unlike Crowell-Collier and Esquire which are Delaware corporations, the same as Tucker Corporation,—Reader's Digest is a New York corporation. Accordingly, aligning Tucker Corporation on the plaintiff's side where it belongs, still leaves diversity with the parties aligned: *Schmidt, an Illinois citizen, and Tucker Corporation, a Delaware corporation,* vs. *Reader's Digest, a New York corporation.*

The question presented is:

(1) Defendant having been sued in the Indiana state court and served with summons on the secretary of state as its statutory agent, moved for and obtained dismissal on the ground that it was not amenable to the process. Plaintiff's appeal from that judgment raises:

(a) The sufficiency of the factual showing made by defendant to support this motion, consisting of its

one affidavit (R. 46) opposed by plaintiff's lengthy counter-affidavit and exhibits (R. 47-62).

(b) The total failure of the Court of Appeals to construe the Indiana statute governing this summons and to test the validity of the process by the statute. It expressly struck the process down solely on the doctrine of a Fourth Circuit decision involving doing business in Virginia, *Cannon* v. *Time, Inc.* (1940) 115 F. 2d 423.

(c) The application of the recent Supreme Court precedents to these facts, so far as not controlled by the statute.

STATUTES INVOLVED.

Statute under which Summons was Served.

"Service of process on corporations not admitted to do business.—The engaging in *any* transaction *or* the doing of *any* business in this state *by any foreign corporation, not licensed nor admitted* to do business in this state under any existing act or any act hereafter enacted shall be deemed equivalent to an appointment by such foreign corporation of the secretary of state, or his successor in office, to be the true and lawful attorney and agent of such foreign corporation upon whom may be served *all* lawful processes, writs, notices, or orders in *any* action or proceeding against such foreign corporation *arising or growing out of,* directly *or indirectly, any act or thing done* by such corporation within the state of Indiana. The engaging in *any transaction* or the *doing of any business* in this state by any foreign corporation not licensed nor admitted to do business in this state under any existing act or any act hereafter enacted shall be significant of the *agreement* of such foreign corporation that *any* such process, writ, notice, or order against it, which is so served, shall be of the *same legal force* and effect

as if served upon a designated resident agent of such foreign corporation. Service of any such process, writ, notice, or order shall be made by leaving duplicate copies thereof, with a fee of one dollar ($1.00), with the secretary of state, or in his office, and such service shall be sufficient service upon such foreign corporation. * * *" (Our emphasis). (Acts 1939, ch. 60, sec. 1)

Section 25-316, Burns 1948 Replacement

Note: Omitted last part of above section deals only with mechanics whereby the Secretary of State sends a copy of the process by registered mail with return receipt to the corporation's principal office designated in its articles of incorporation, and upon return of the receipt or showing a refusal of acceptance, the Secretary of State attaches same to the copy of process retained by him and mails same to the clerk of the court who files same as a part of the record.

The following are companion sections of the same Act:

"Nothing herein contained shall be construed as preventing any party adverse to any such foreign corporation in any such action or proceeding from relying upon or resorting to any *other process,* remedy or security provided by law. (Acts 1939, ch. 60 § 4, p. 407)." (Our emphasis).

Section 25-319, Burns 1948 Replacement

"This act (§§ 25-316-25-323) shall apply to all actions or proceedings now pending in this state or which may hereafter be commenced or instituted. (Acts 1939, ch. 60, § 5, p. 407)." (Our emphasis.)

Section 25-320, Burns 1948 Replacement

"*Any* action or proceeding against *any* foreign corporation *doing business* in Indiana *and not licensed* nor admitted to do business in the state of Indiana may be instituted or commenced *in any county* within the state of Indiana. (Acts 1939, ch. 60, § 6, p. 407)." (Our emphasis).

Section 25-321, Burns 1948 Replacement

"The provisions of this act (§§ 25-316-25-323) are *intended to supplement the existing statutes* of this state and shall in no respect be considered a repeal thereof. (Acts 1939, ch. 60, § 7, p. 407)." (Our emphasis.)

Section 25-322, Burns 1948 Replacement.

"If any part, subdivision or section of this act (§§ 25-316-25-323) *shall be deemed unconstitutional,* the validity of the remaining provisions *shall not be affected thereby.* (Acts 1939, ch. 60, § 8, p. 407)." (Our emphasis.)

Section 25-323, Burns 1948 Replacement

Related Statute.

The phrase "as if served upon a designated resident agent of such foreign corporation" in the latter part of *Section* 25-316 *supra,* refers to the following statute on that subject:

"Each foreign corporation admitted to do business in this state, shall keep constantly on file in the office of the secretary of state an affidavit of its president or a vice-president and its secretary or an assistant secretary, setting forth the location of its principal office in this state, and the name of some person who may be found at such office as its agent or representative *on whom service of legal process may be had in all suits and actions that may be commenced against it.* For the purposes of this section the application for admission filed by a foreign corporation shall be deemed to be such an affidavit. * * *" (Acts 1929, ch. 215, § 61, p. 725; 1941, ch. 26, § 8, p. 729; 1949, ch. 194, § 16, p. 617)

Section 25-306, Burns 1953 Cumulative Pocket Supplement

STATEMENT OF THE FACTS.

The lower court sustained (R. 63-65) defendant's motion to dismiss the action for lack of jurisdiction over its person (R. 29), from which plaintiff appealed. The Court of Appeals affirmed. (R. 87).

The derivative stockholder's complaint on behalf of Tucker Corporation for defendant's alleged libel of the corporation in this case (R. 14) is an exact replica of the complaint in the companion *Crowell-Collier* case, filed the same day in the same Circuit Court of Lake County, Indiana, (R. 14) except that the libel was in defendant's "Readers Digest" magazine. Emphasizing the close similarity of the two torts, is the fact that this article was "Condensed from Colliers" (R. 21), being a condensed version of the article sued on in the *Crowell-Collier* case.

But diversity admittedly exists in this case and the removal was proper, because, unlike Esquire, Inc. and Crowell-Collier which are corporations of the same state as Tucker Corporation (Delaware), this defendant is a New York corporation (R. 3, par. 5). Accordingly, alignment of Tucker Corporation on the plaintiff's side where it belongs, leaves the beneficial plaintiff a Delaware Corporation versus the defendant, a New York corporation.

So there was no motion to remand.

Complaint.

So far as pertinent to process and jurisdiction of defendant's person, the complaint alleges that defendant is a foreign corporation, and—

> "2. Said defendant is and at all times mentioned in this complaint has been *in fact* engaging in business

in the State of Indiana, but it is not and has not been licensed nor admitted to do business in this state under any statute."
R. 14

Summons issued out of the state court for the defendant and was served on the Secretary of State of Indiana as its statutory agent for process (R. 10-12).

Motion to Dismiss.

After removal, defendant filed a motion to dismiss (R. 29) on two grounds:

I. Lack of jurisdiction of its person, for which it asks the Court "to dismiss the action or in lieu thereof to quash and set aside the summons" (R. 29) served through the Secretary of State as aforesaid. It states that "in support of this motion" it attaches the affidavit of its treasurer, Abbott, which it says shows (1) it is a New York corporation, (2) it "has not qualified to do business in the State of Indiana" and "has never consented to be sued" in the state, (3) not at the present time or any other time mentioned in the complaint "has it ever engaged in any transaction in the State of Indiana or has it ever done any business in the State of Indiana". (R. 30)

Abbott's affidavit (R. 46), about half a page in length, states that defendant "has never qualified" or "consented to be sued" in Indiana. Its magazine is published monthly by the defendant at Pleasantville, New York, is printed outside of Indiana (place not specified), and—that the said Reader's Digest is sent from the places of printing by United States mail directly to each subscriber residing in the State of Indiana; that the newsstands and stores in Indiana which handle Reader's Digest do not purchase

their copies from The Reader's Digest Association, Inc., but purchase them from local wholesalers of magazines who in turn have purchased their copies from a magazine wholesaling corporation of the State of New York to which The Reader's Digest Association, Inc. sells the entire United States edition except office copies and the copies mailed direct to subscribers as aforesaid; that The Reader's Digest Association, Inc. maintains no office in the State of Indiana for editorial purposes, for the solicitation of or collection upon subscriptions, for distribution, or for any other purpose, and does no business, and engages in no transactions whatever in said State.

(R. 46-47).

II. "In the event the court should overrule" the above motion I, defendant moves "to dismiss the action on the ground that the complaint fails to state a claim against this defendant upon which relief can be granted." (R. 30). Supporting this motion are six specifications which are exact replicas of the six specifications of the similar motion to dismiss the complaint in the *Crowell-Collier* case.

To those specifications is added No. 3, that the action is barred by a section of the Indiana statute of limitations which, defendant claims, imports into Indiana for its benefit the New York one-year libel limitation (as against the regular two-year Indiana limitations on libel). (R. 31, par. 3).

Plaintiff's Counter-Affidavit.

Plaintiff, protesting the insufficiency of defendant's factual showing, filed a counter-affidavit, prefaced by the following statement of his position:

> "The plaintiff, without conceding defendant's right to seek dismissal by means of an affidavit of extraneous

facts which directly contradict the jurisdictional fact allegations of rhetorical paragraph 2 of the complaint, and without conceding the legal sufficiency of the affidavit to make such contradiction if permissible, files this counter-affidavit to be considered by the court only in the event both of the above questions are resolved against the plaintiff, to-wit:"

(R. 47).

The affidavit which follows the above, alleges facts and sets out exhibits to show that defendant's activities in the state, *in the light of the nature of its business,* suffice to subject it to process,—consisting of having agents in the state who *sign* and *deliver* in *its name* binding subscription *contracts* on the spot with Indiana subscribers, *collecting* the price, *deducting* their commissions and remitting the balance to defendant, plus having the agents *service* and *adjust* complaints of defendant's subscribers on the spot. (R. 48-50). Grouping and summarizing these for convenience:

(1)

On the Spot Contracts in Defendant's Name.

Defendant launches the agent with a kit of working materials, a ready-made sales talk and instructions (repeated) to mail out locally the preparatory sales material it gives him. (Exhibit C, R. 53-55).

The most important part of his kit to him (and to us) is the order book defendant gives him (Exhibit F, R. 61) with its name on the top cover and the following instructions printed on the inside of the cover (our italics):

How To Use This Order Book.

Here is the most important "tool" in your whole kit of Reader's Digest supplies—your order book!

Always carry it with you. *It will serve* not only as *your authority to represent The Reader's Digest,* but as a handy aid in "signing up" subscribers wherever you may be. Note how your order book has been designed to do a three-fold job:

1) Subscription Order Form

All the information required for correct, speedy entry of your subscriptions should be plainly printed here. Space is purposely provided for Donor on every order form, because The Reader's Digest is one of the most popular gifts throughout the year. Note that beautiful Gift Cards will be mailed for special occasions—a good talking point. If you have a rubber stamp, you can save time by stamping your Name and Address on all your order forms in advance.

2) *Subscriber's Receipts*

This convenient form makes it unnecessary for you to carry a separate book of receipts. You can now *fill out a receipt stub and hand it to the subscriber whenever you take an order.*

3) Copy of Each Subscription

Underneath each order form is a duplicate copy *for your file.* By placing carbon paper under the order form, you will obtain a complete, permanent record of each subscription. *File these records by date,* and *be sure to go after the renewals* at least two months before the subscription expires. Additional suggestions for good service are listed on the inside cover of this order book.

See Subscription Rates On Back Cover.

All Subscriptions Must be Sold at Authorized Rates.
Exhibit F, R. 61.

Within the above cover is a sheaf of order blank forms whereby the agent writes up the order on the spot, *collects the money* and *hands the subscriber* a stub "Receipt", *in payment for"* a specified subscription, signed with the defendant's printed name "by" the agent who is called defendant's "Representative" on the receipt. Though short, it is a complete written contract binding defendant to deliver, *not subject to home office acceptance,* and not subject to be cancelled by defendant.

On the order blank which goes in to the defendant, with the agent keeping a copy, he is called "Agent".

The following is as nearly as this order blank and stub receipt can be printed (our bold face for ease in locating parts we have described):

Subscription Order Form

Agent: M ..... **Date** : **Subscriber's**
Address: ..... : **Receipt**
.....
..... : Date: .....
Check Term : Received from:
Subscriber: M ..... Two : .....
Address: .....Years ..... : .....
..... **One** : the amount of:
.....Year ..... : in payment for:
..... **Months** : .....
If Gift Subscription. print : ..... years of
donor's name and address : **READER'S**
below : **DIGEST**
Donor: M ..... Two
Address: .....Years ..... : Signed:
..... One : .....
.....Year ..... : .....
..... **Months** : **Representative**
Check Gift Card to be sent
Subscriber, to arrive on
.....

Date
..... Birthday
..... Graduation
..... Wedding
..... General

Check above only if Donor includes Own subscription.

(Exhibit F, R. 61).

Following is an excerpt from defendant's list of rates which it furnishes him, telling him how much "you keep" (about one-third) and how much "you send":

	You Collect	You Send	You Keep
Single One-Year subscription	$2.75	$1.80	$.95
Single Two-Year subscription	5.00	3.60	1.40

Exhibit D, R. 57

(2)

Servicing Subscribers.

The agent's *services,* both to the defendant and its subscribers, do not end with making the above contract. Defendant, probably in line with its "personal contact" policy with subscribers, but more especially to *save a lot of work and expense at its home office* in servicing customers,—furnishes in the agent's kit the following "Representative's Correction Form" which he uses to take care of missing copies, expirations, extending subscriptions, *changing addresses, transferring subscriptions* from one subscriber to another, etc. At the bottom, the defendant promises that it will comply with "your instructions *for adjustments*". Following is the form (our italics):

Representative's Correction Form

The Reader's Digest Association, Pleasantville, N. Y.

Please PRINT all instructions clearly, to insure accuracy.

Important: To speed service to your customers, use this form for the complaint of only one subscriber. Use a Separate form for Every Subscriber complaint.

Subscriber's Name .....

Subscriber's Address .....

.....

.....

Donor's Name .....

Donor's Address .....

.....

.....

Please Correct as Checked Below

.....Expiration notices received

.....Duplicate copies for ..... received.

.....Copy for ..... not received

.....No copies received since .....

.....Change Address to: .....

.....

.....

.....Send missing Copy

.....Extend subscription

.....General subscription

Reason.....

.....

.....Transfer Subscription to: .....

.....

Remarks .....

.....

To save your time and ours, we do not acknowledge *your instructions for adjustments,* changes of address, etc. So even though you do not hear from us, you may assume your wishes have been complied with.

Representative's Name .....

Representative's Address .....

.....

Please Print Clearly

Exhibit H. R. 60.

(3)

Instructions and Control of Agent by Defendant.

As already shown under (1) supra, defendant gives the agent written instructions on what to do and at least one restriction on what he *cannot do*—cut prices on what he sells below defendants "authorized rate".

And he has the customary book work of a selling agent to do for the defendant also. With each day's orders (and money) he is required to fill out a summary sheet covering the sales, apparently for use in defendant's home office accounting. The heading (only) of the sheet reads:

SUMMARY.

Please fill out and mail with each days orders.
The Reader's Digest
Pleasantville, N. Y.

Exhibit G, R. 59

The counter-affidavit closes with the following:

> "The number, names and locations of said representatives in Indiana is unknown to affiant and unobtainable by him except through the secret records of the defendant, as is also the names and locations of the subscribers obtained by them. * * * But it is apparent upon the face of said exhibits, and based thereon affiant has good ground to believe and does verily believe and accordingly states, that at the time of service of summons herein and prior and subsequent thereto defendant did in the manner and by the means aforesaid have such representatives in Indiana who did on its behalf and in its name engage in transactions and do business for it in the manner and by the forms of instruments above exhibited." (R. 51.)

No further affidavit or response was made by defendant to the above counter-affidavit. The court heard no evidence, but heard oral arguments and received briefs on the above record. (R. 47).

District Court's Opinion.

Based solely on the aforesaid record (complaint, motions to dismiss, and one affidavit on each side) the Court entered an order that defendant's "motion to dismiss the action * * * is granted." (R. 63).

The order is accompanied by a memorandum opinion which, in a single paragraph, recites that "The pertinent facts on jurisdiction are: * * *" (R. 64).

This is followed by a single paragraph reciting that "Upon these facts it is concluded that the defendant is not 'present' within the State of Indiana for the purpose of giving the court jurisdiction over it by service of process on the Secretary of State under Section 25-316 Burns Ind. Sts. 1948 Repl." The supporting opinion

predicates the decision solely on *Cannon* v. *Time, Inc.* 115 F. 2d 423, saying defendant's representatives in Indiana, *whether few or many* are *independent contractors,* as there. (R. 65).

Relative to the merits, the opinion closes with the statement:

> "While the ruling on this jurisdictional question disposes of the action, nevertheless it must be pointed out that the motion to dismiss would otherwise have to be granted for the reasons stated in *Schmidt* v. *Crowell-Collier,* Hammond Civil No. 1265." (R. 65)

ARGUMENT.

The Factual Situation.

Factually, it seems to us that the opinion does not give adequate importance to the function which these Indiana "representatives" and their activities in the state play in defendant's business, nor adequate consideration to the nature of the "subscriber's receipt" issued and delivered by the representative on the spot which, though small, in line with the small and simple transaction, nevertheless *made a complete binding contract*, signed and paid for in Indiana, between defendant's representative and the purchaser,—a transaction more complete than was held sufficient in *International Shoe Company* v. *State of Washington,* (1945) 326 U. S. 310, 313-314, 66 S. Ct. 154, 157. While lacking the security feature, these transactions somewhat resemble, and far exceed in local nature, the selling of health insurance by mail which was held sufficient in *Travelers Health Association* v. *Commonwealth of Virginia* (1950), 339 U. S. 643, 647-648, 70 S. Ct. 927, 929-930.

Added to this is the fact that these agents *service* the subscribers' needs *after* the contract is made, taking care of their complaints, changes of address, transferring subscriptions from one person to another, cancellations, etc. (R. 48, 60). Again, while small and simple like the transaction itself, these acts, done at the direction of and in co-operation with defendant's home office, are obviously *to save the home office an enormous amount of work which would normally belong to it,* and they also serve to create and maintain *good will* for the defendant and its product

in Indiana *in addition* to the subscriber's contract completed months or years in the past. This again exceeds the activities in the *International Shoe Company* and *Travelers Health Association* cases, *supra.* It constitutes "promotional work and investigation of complaints" which was held sufficient to bring a corporation within the state for process, in *Keppel* v. *E. W. Wiggins Airways,* (D. C. Mass. 1952) 103 F. Supp. 911-912.

The point is not the size, and certainly not whether they work part or full time, but whether, *collectively,* they serve a substantial function in defendant's business.

Clearly they do. Circulation (subscribers) is the life blood of every magazine, and they spend vast sums to get it. "Obtaining subscribers" has rightly been called one of the "essential factors" in a magazine publisher's business:

> "The *functions* of a magazine publishing company, obviously, include gathering material to be printed, *obtaining* advertisers *and subscribers,* printing, selling and delivering the magazines for sale. *Each* of these, we think, constitutes an *essential factor* of the magazine publication business. Consequently, if a nonresident corporation sees fit to perform *any one* of those essential functions in a given jurisdiction, it necessarily follows that it is conducting its activities in such a manner as to be subject to jurisdiction. * * *"
>
> *Consolidated Cosmetics* v. *D-A Publishing Co.* (7 Cir.) 186 F. 2d 906.

Contrary to the impression of irresponsible freedom which the opinion implies, the defendant *gave the agent definite instructions* as to *how* to do his work, and placed *restrictions* and *duties* on him, including adhering to defendant's specified price, keeping a record of his customers' renewals, *and turning in daily summary sheets to the home office* with his orders and remittances,—all these things

being characteristic features of an agent of the commission selling type. This is remote from the "independent contractor" consisting of a nation-wide news servicing corporation which was the "independent contractor" between the publisher and its subscribers in *Cannon* v. *Time, Inc.*, (4 Cir. 1940) 115 F. 2d, 423 which is the *sole authority* on which *both* the opinion of the District Court (R. 65) and the opinion of the Court of Appeals are predicated (R. 85, 210 F. 2d 916),—both courts saying "we can see little difference" between this defendant's "representatives" who make *direct personal contacts* and *contracts* for this publisher in the state, as compared with the great independent corporate contractor in the *Time* case.

Actually, there is no similarity between these representatives and that corporate contractor, but a close similarity between their activities and the functions they perform in the defendant's method of business compared to the *International Shoe Company* case, 326 U. S. 310 *supra*, and *Real Silk Hosiery Mills* v. *Philadelphia etc. Co.* (3 Cir. 1930) 46 F. 2d, 25, except that in those cases the agents had to *forward* the orders for *acceptance* to the home office, whereas here they *complete* the contract and *bind* the defendant *on the spot*, and afterward serve the defendant in servicing its customers. Incidentally, this marks another wide departure from *Cannon* v. *Time, supra*, where the publisher took great pains, as is usually done, to specify that the order be *accepted* and *completed* at the *home office*:

> "No one has authority to accept subscriptions except the head office of Time, Inc., in Chicago, and no subscription can constitute a binding agreement until it is so accepted."
>
> *Cannon* v. *Time, Inc.*, (4 Cir. 1940) 115 F. 2d 423, 424, bottom.

Defendant's Secretiveness and Failure to Produce Facts.

While the above facts, all dug up and produced by the plaintiff, should suffice in any event to show the defendant "present" in the state, this is further emphasized by the *secretive position* taken by the defendant throughout this case, namely:

Confronted by a complaint which alleged it was doing business in Indiana (R. 14, par. 2) and summons regularly issued and served under the Indiana statute applicable to the complaint (R. 3, par. 7), (R. 10-12) which creates a *prima facie* rebuttable presumption of valid service (20 C. J. S., Corporations, sec. 1948, page 221) and places the burden on the defendant to support its motion by sufficient *prima facie* proof, and by a preponderance of the proof if opposed, (20 C. J. S., Corporations, sec. 1949, page 222), —the defendant presented no factual support in the first instance except the affidavit of its *treasurer*, Abbott, (R. 46), which is half a page long and contains nothing but his conclusion that it is not doing business in Indiana, plus a few factual statements *not bearing on the activities of its agents* but telling of its sales to *newsstands*, apparently to bring it within the doctrine of *Cannon* v. *Time*, 115 F. 2d 423.

This affidavit of its *treasurer* who had full knowledge, *concealed* the activities of these agents (and whatever other business the defendant may do in the state not yet discovered by the plaintiff).

Confronted by plaintiff's detailed and documented counter-affidavit, defendant then remained silent, offering no proof as to the *number* and *extent* of activity of these agents in the state. This, under established doctrines, raises a

strong factual presumption that the disclosure would be unfavorable to the defendant, and justifies overruling its motion, (*Industrial Research Corporation* v. *General Motors Corporation* (D. C. N. D. Ohio 1928) 29 F. 2d 623, 626, 627, points 5 and 10). This is particularly true in view of the comparative ability of the parties to produce the facts (*Henderson* v. *Richards & Co.* (4 Cir. 1928) 25 F. 2d 225, points 5-8.

Total Failure to Construe and Apply the Indiana Process Statute.

Confronted by this Indiana statute, which is obviously remedial and plainly makes a studied attempt to go as far as the legislature's constitutional powers would permit, the Court of Appeals totally failed to test this summons by the Indiana statute, but struck it down arbitrarily on the sole authority of an inapplicable case involving doing business in Virginia, *Cannon* v. *Time,* (4 Cir. 1940) 115 F. 2d 423.

First, in quoting the statute (R. 83) the opinion inadvertently leaves off what we think is the significant *further* provision that such transactions and business shall signify the corporation's agreement that the served process—

> "shall be of the *same legal force and effect as if served upon a designated resident agent* of such foreign corporation."
>
> Section 25-316, Burns 1948 Replacement.

The last quoted language refers to the following section which provides that the resident agent shall be one—

> "on whom service of legal process may be had *in all suits and actions that may be commenced against it.*"
>
> Section 25-306, Burns 1948 Replacement.

The purpose of this provision of Section 25-316, tying in with Section 25-306, is to see to it that non-complying

foreign corporations shall fare *no better* than the ones who comply (which is a recognized legitimate object).

It has the further effect of repelling any contention that the cause of action sued upon must *arise out of* an Indiana transaction. However, the complaint does allege that part of this nation-wide *tort* occurred in Indiana because Tucker Corporation's injured business and good will was nation-wide (R. 14, par. 4), so part of the injury occurred in Indiana, and the publication was nation-wide "including at least 100,000 copies in the State of Indiana and all counties thereof." (R. 15, par. 6).

An unusual feature of the part of the Reader's Digest opinion dealing with the Indiana statute is that it starts to construe the statute and then backs away and leaves the question in mid air, as also did the Crowell-Collier part of the opinion. This seems to indicate inability to find, or to agree upon, a ground for the decision. (R. 84-85).

It takes up *International Shoe Company* v. *State of Washington,* 326 U.S. 310 and then lays it aside for the announced purpose of construing the statute to determine if it is as broad as the *International Shoe* case permits. It seems about to give it a narrow construction based on an old, inapplicable Indiana case, contrary to the statute's plain purpose. But then it backs away and announces:

> "However, we do not think it *necessary* to decide whether or not the Indiana statute is as broad as the *International Shoe* doctrine would permit. Whether the question is one of due process, *or state law,* we think the District Court correctly decided the question on the principles announced in *Cannon* v. *Time,* 4 Cir., 115 F. 2d 423." (Our emphasis).
>
> R. 85, 210 F. 2d at p. 916.

But what is there in *Cannon* v. *Time,* a case from another circuit involving doing business in Virginia, *which relieves the Court from construing this Indiana statute* to determine its real scope and then measure this state of facts and this process by the statute?

If the Court had held the statute to be as broad as permitted by the *International Shoe* case and then applied that yardstick, the opinion would be logical and understandable. Or if it had construed the statute to be of some lesser scope and then applied that yardstick, it would be understandable.

But it ignores the *International Shoe* case, and throws up the attempt to determine the scope of the statute, and applies the *Cannon* v. *Time* yardstick *as the sole and conclusive basis for striking down this Indiana statutory process.* Besides being contrary in its facts, as already shown, that case cannot lawfully furnish a test for this Indiana process.

The net result, on the face of the opinion, is that there was no lawful basis for this decision striking down this Indiana process. It was not stricken down as not authorized by the Indiana statute, or as going beyond the limits authorized by the Supreme Court, but as being contrary to Cannon v. Time.

R. 84-85, 210 F. 2d 915-916.

Wherefore, petitioner prays that this Honorable Court may issue its writ of certiorari to bring up and review this case, and for all other just and proper relief.

JAY E. DARLINGTON,
Attorney for Petitioner.

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HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 786 93

GEORGE SCHMIDT,

Petitioner,

vs.

THE READER'S DIGEST ASSOCIATION, INC.,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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THE GOTTSBERG-BARBER PRINTING COMPANY, CHICAGO

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Petitioner Raises Only a Moot Point.

Our motion to dismiss (Rec. 29) relied both upon lack of jurisdiction over the person (Rules of Civil Procedure, 12 b 2) and upon failure of the complaint to state a claim upon which relief can be granted (Rule 12 b 6).

The order of dismissal was in general terms (Rec. 63).

The District Court sustained both bases for the motion. We quote the first and last paragraphs of the opinion (Rec. 64-5):

> "The Defendant, The Reader's Digest Association, Inc., moves to dismiss the action on the ground that it is not amenable to suit in Indiana. Another ground for dismissal is that the complaint fails to state a claim against this defendant.
>
> * * * * *
>
> "While the ruling on this jurisdictional question [validity of service] disposes of the action, neverthe-

> less it must be pointed out that the motion to dismiss would otherwise have to be granted for the reasons stated in *Schmidt* v. *Crowell-Collier,* Hammond Civil 1265." [Crowell-Collier record, No. 785, page 69.]

Irrespective of any review of the finding of inadequate service, the insufficiency of the complaint upon its face disposes of the case and *that ruling is not challenged.*

In *Brown* v. *Allen,* 344 U. S. 443, the court said (459):

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

Other similar cases are: *Riley Investment Co.* v. *Commissioner,* 311 U. S. 55, 59; *Helvering* v. *Gowran,* 302 U. S. 238, 245; *Linde Air Products* v. *Morse Dry Dock & Repair Co.,* 246 Fed. 834, 837 (C. A. 2); *United States* v. *Porter Fuel Co.,* 247 Fed. 769, 771 (C. A. 8).

The same rule applies to orders sustaining demurrer or motion to dismiss. In *Chicago Title & Trust Co.* v. *Newman,* 187 Fed. 573, 577 (C. A. 7), the court said:

> "The court also had power to sustain a demurrer for want of equity, as it did; and it is of no consequence, especially upon this appeal by the receiver, whether or not it assigned a wrong reason for doing so."

To the same effect is *Posey* v. *Tennessee Valley Authority,* 93 F. (2d) 726, at 727 (C. A. 5).

Wherefore, we respectfully contend that the petition for certiorari presents only a moot point.

For discussion of the point that the complaint states no cause of action upon which relief can be granted, we refer to the District Court opinion in the Crowell-Collier record, page 69; to the Court of Appeals opinion, 210 F. (2d) 908; to the opinion in the Illinois case, 349 Ill. App. 229, 110 N. E. (2d) 464, leave to app. den. 414 Ill. 626; and to our answer in No. 785 herein.

Inadequacy of Service of Process.

The service of process was upon the Indiana Secretary of State, pursuant to Sec. 25-316, Burns Indiana Statutes, 1948 Repl., the pertinent portion of which reads:

> "The *engaging in any transaction or the doing of any business* in this state by any foreign corporation not licensed nor admitted to do business in this state under any existing act or any act hereafter enacted shall be deemed equivalent to an appointment by such foreign corporation of the secretary of state, or his successor in office, to be the true and lawful attorney and agent of such foreign corporation upon whom may be served all lawful processes, writs, notices, or orders in any action or proceeding against such foreign corporation *arising or growing out of, directly or indirectly, any act or thing done by such corporation within the State of Indiana.* * * *" (Italics ours.)

The affidavit of the treasurer of The Reader's Digest Association, Inc. (Rec. 46-7):

> "ROY C. ABBOTT, being first duly sworn, deposes and says that he is a resident of the State of New York and is the Treasurer of THE READER'S DIGEST ASSOCIATION, INC., a New York corporation; that said corporation has never qualified to do business in the State of Indiana and has never consented to be sued in said State and is not engaging in any transaction or the doing of any business in the State of Indiana; that the Reader's Digest published each month in the United States is published by said corporation at Pleasantville, New York, and is printed outside the State of Indiana; that the said Reader's Digest is sent from the places of printing by United States mail directly to each subscriber residing in the State of Indiana; that the newsstands and stores in Indiana which handle Reader's Digest do not purchase their copies from The Reader's Digest Association, Inc., but purchase them from local wholesalers of magazines who in turn have purchased their copies from a magazine wholesaling corporation of the State of New York to which The

> Reader's Digest Association, Inc. sells the entire United States edition except office copies and the copies mailed direct to subscribers as aforesaid; that The Reader's Digest Association, Inc. maintains no office in the State of Indiana for editorial purposes, for the solicitation of or collection upon subscriptions, for distribution, or for any other purpose, and does no business and engages in no transactions whatever in said State."

Petitioner's counter-affidavit was supplied by his counsel who before Christmas of 1952 wrote a letter to the circulation department of Reader's Digest, as anyone was invited to do by the advertising in the Reader's Digest, and obtained the packet and papers and forms and purported to become one of what is known in the trade as "pin money boys and girls" (Rec. 51-62). Whoever applied by mail received the packet and could get subscriptions, deduct their commission, and remit. Every detail of the packet is described in the petition.

Petitioner at page 6 quotes from his complaint (Rec. 14) that defendant "has been in fact engaging in business in the State of Indiana." That conclusion in the unsworn complaint is contradicted by the affidavits.

We quote from the District Court's opinion (Rec. 64):

> "The defendant is a New York corporation. It has not qualified to do business in Indiana. The Reader's Digest magazine is published in the State of New York and is not printed in Indiana. The magazine is sent to its Indiana subscribers by mail. The newsstands and stores in Indiana handling Reader's Digest purchase their copies from magazine wholesalers, who in turn buy these copies from a wholesale magazine concern doing business in the State of New York, to which concern the defendant sells its entire newsstand and store-outlet supply of magazines. The defendant maintains no office in Indiana. However the defendant, through its magazine, does solicit 'Community Representatives' in Indiana. To the person answering the solicitation the defendant furnishes supplies to

aid him in obtaining subscriptions to the Reader's Digest. The subscription price is collected by this person, who then sends the amount collected less his commission to the defendant in New York. A subscription order book is furnished which includes a form designated 'Subscriber's Receipt' indicating the subscriber's name, the amount paid for the subscription and a place for the solicitor to sign as 'Representative.' A 'Correction Form' for 'entering any complaints or changes of address' is also furnished.

"Upon these facts it is concluded that the defendant is not 'present' within the State of Indiana for the purpose of giving the court jurisdiction over it by service of process on the Secretary of State under Section 25-316 Burns Ind. Stat. Ann. 1948 Repl. Parenthetically, it should be noted that this statute relates to constituting the Secretary of State the statutory agent upon whom process may be served under certain circumstances in suits against foreign corporations; it is collateral to the due process question whether by reason of the foregoing activities the defendant has subjected itself to the jurisdiction of the Indiana courts. The number of solicitors the defendant has in Indiana or the extent of their activity is not shown. But this is not important because these solicitors, if one or many, are not employees of the defendant. Although they may be defendant's representatives, they are independent contractors no less than the Richmond News Company which was held to be an independent contractor in *Cannon* v. *Time, Inc.*, 115 F. 2d 423, and whose activity in accepting and collecting subscriptions for Time magazine in Virginia was held not to be a business activity of Time, Inc., in that State."

The Court of Appeals reached the same conclusion. We quote from the opinion, 210 F. (2d) 908, at 915-6:

"It is not contended that Reader's Digest was doing business in Indiana through the store and newsstand sales of its magazine, nor through the mailing of its magazine to Indiana subscribers. It is only the activity of the so-called community representatives which, it

is said, constitutes such 'doing business' as to make Reader's Digest amenable to service of process in Indiana.

"* * * The Reader's Digest community representatives are under no supervision, direction or control, they conform to no pre-arranged schedule or routine, they may solicit or not as it suits their opportunity or inclination. Certainly, they are not agents of Reader's Digest within the meaning of all that term implies. They are urged by the defendant to work in their spare time, for their own account, to supplement their income. We think it is inescapable that they be considered as occupying the position of independent contractors."

Petitioner's Contentions Respecting Service of Process.

Petition (page 3) asserts there was a failure to construe the Indiana statute. Completely to refute that statement it is necessary only to quote from the opinion of the District Court for the Northern District of Indiana, as follows (Rec. 64):

"Upon these facts it is concluded that the defendant is not 'present' within the State of Indiana for the purpose of giving the court jurisdiction over it by service of process on the Secretary of State under Section 25-316 Burns Ind. Stat. Ann. 1948 Repl. Parenthetically, it should be noted that this statute relates to constituting the Secretary of State the statutory agent upon whom process may be served under certain circumstances in suits against foreign corporations; *it is collateral to the due process question whether by reason of the foregoing activities the defendant has subjected itself to the jurisdiction of the Indiana courts.*" (Italics ours.)

The District Court for the Northern District of Indiana construed the Indiana statute. Under a later heading we will discuss that statute at some length, citing Indiana and other decisions.

We referred hereinbefore to the fact that the petitioner

charges error by the District Court in its ruling respecting the service, without even any suggestion of a charge of error respecting the District Court's further ruling that the complaint failed to state a cause of action upon which relief can be granted. Now, the attack upon service is similarly inconclusive. The argument is confined to *International Shoe Company* v. *Washington*, 326 U. S. 310 and similar cases, and the petitioner attempts to avoid any consideration of the construction which the District Court for the Northern District of Indiana correctly gave to the Indiana statute.

Petition (page 24) refers to the opinion of the Court of Appeals as follows:

> "* * * if the Court had held the statute to be as broad as permitted by the *International Shoe* case and then applied that yardstick, the opinion would be logical and understandable."

We respectfully submit that the petitioner is confused in his reliance upon the *International Shoe* case. The issue here is not how far Indiana could go by a statute seeking to reach foreign corporations upon causes of action between non-residents and arising elsewhere. The issue is *how far Indiana had gone* in Sec. 25-316. Under a later heading we shall cite applicable decisions.

Petition (page 23) criticizes the Court of Appeals opinion as follows:

> "[The Court of Appeals] seems about to give it [Sec. 25-316] a narrow construction based on an old, inapplicable Indiana case, contrary to the statute's plain purpose. But then it backs away and announces: 'However, we do not think it necessary to decide whether or not the Indiana statute is as broad as the International Shoe doctrine would permit. Whether the question is one of due process, or State law, we think the District Court correctly decided the question on the principles announced in *Cannon* v. *Time*, 4 Cir., 115 F. (2d) 423 * * *.'"

The issue, after briefs and oral argument, had been narrowed to the "community representatives," (Court of Appeals opinion, 210 F. (2d) 908, 915):

> "It is not contended that Reader's Digest was doing business in Indiana through the store and newsstand sales of its magazine, nor through the mailing of its magazine to Indiana subscribers. It is only the activity of the so-called community representatives which, it is said, constitutes such 'doing of business' as to make Reader's Digest amenable to service of process in Indiana."

The District Court for the Northern District of Indiana had held that such activity in Indiana as was shown by the affidavits did not bring the defendant under Sec. 25-316, and that such conclusion was collateral to any Due Process point.

The Court of Appeals specifically held that "whether the question is one of due process, *or State law*" the District Court for the Northern District of Indiana was right. *Cannon* v. *Time, Inc.*, was cited because there, as here, the subscription activities were deemed to be by independent contractors.

Petitioner's Futile Effort to Avoid Construction of Sec. 25-316.

Petitioner seeks to dispose of Sec. 25-316 by ignoring it.

Petitioner cites and relies upon *International Shoe Company* v. *Washington*, 326 U. S. 310, and later cases, which under facts there involved denied to foreign corporations relief under the Fourteenth Amendment from local process. In each of those cases the process was effective and valid under the local law. In the present case, the process was not valid under Indiana law, as the District Court for the Northern District of Indiana held (Rec. 64).

The Court of Appeals said, 210 F. (2d) 908, at 915:

> "* * * Indiana may not choose to 'extend to suitors access to its courts against foreign corporations as amply as it has power to do under the Constitution.' "

In *Partin* v. *Michaels Bronze Co.*, 202 F. (2d) 541 (C. A. 3), a Kentucky corporation selling parking meters in Pennsylvania was sued for libel in Pennsylvania. The Court said (544):

> "But despite plaintiff's reliance upon the *International Shoe* case, we do not reach that question here. An examination of Pennsylvania * * * decisions * * * shows us pretty clearly that the Pennsylvania courts would not regard this defendant corporation as subject to their jurisdiction. We do not, therefore, get to the question of how far Pennsylvania could go if it cared to exercise all the power it constitutionally had."

In *Rosenthal* v. *Frankfort Distillers Corp.*, 193 F. (2d) 137 (C. A. 5), the Court said (141):

> "Appellant's insistence, that the later decisions of the Supreme Court of the United States have made inapplicable the decisions cited and relied upon by appellee and the district judge, misconceives the primary question at issue. This is not, as appellant seems to think, what permissable reach, within the federal constitution, that court would, under the facts, give to a construction by the state court of the Taxes Statutes governing the doing of business in the state by, and the service of process upon, foreign corporations. It is what construction the courts of Texas have actually given to the statutes."

Petitioner, of course, can base no argument of due process upon the failure of Indiana to provide for service upon foreign corporations in a case such as he brought. In *Perkins* v. *Benguet Mining Co.*, 342 U. S. 437, the Court said (440):

> " 'Provisions for making foreign corporations subject to service in the State is a matter of legislative

> discretion, and a failure to provide for such service is not a denial of due process. Still less is it incumbent upon a State in furnishing such process to make the jurisdiction over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the State.' "

We respectfully submit that the petitioner does not avoid construction of Sec. 25-316 by merely discussing the Due Process cases.

It being a matter of Indiana law, and the District Court for the Northern District of Indiana having applied what it considered to be Indiana law, with affirmance by the Court of Appeals, and the petitioner citing no Indiana authority whatever and presenting no argument respecting such construction of Indiana law, we fail to see what, if anything, is now presented to this Court.

The Indiana Statute.

The Indiana statute provides for service of process upon foreign corporations under certain circumstances by serving the Indiana Secretary of State. In 1939, when the statute was enacted (Petition, page 4), it was the law that mere solicitation of business within the State did not subject the foreign corporation to local jurisdiction. *Green* v. *Chicago, B. & Q. R. Co.*, 205 U. S. 530; *Philadelphia & Reading R. Co.* v. *McKibben*, 243 U. S. 264.

In 1939, furthermore, it was the law that a State statute could not legally provide for service of a foreign corporation by serving the Secretary of State upon a cause of action arising elsewhere and between non-residents. *Simon* v. *Southern Ry.*, 236 U. S. 115, 130; *Old Wayne Life Ass'n* v. *McDonough*, 204 U. S. 8, 22.

We are not concerned here with the extent to which those four Supreme Court cases can be directly relied upon today. Those decisions were respected in 1939 when Sec. 25-316

was enacted. And those cases tend to explain the limitations prescribed by the Indiana statute to service upon a foreign corporation and the meaning of those limitations.

Sec. 25-316, providing for service upon foreign corporations by serving the Secretary of State, actually had two express limitations. One was that the foreign corporations be *"engaging in any transaction or the doing of any business in this state."* The other limitation was that the action *arise or grow out of, "directly or indirectly, any act or thing done by such corporation within the State of Indiana."*

Bearing upon the statute, in addition to the foregoing four cases, are the following Indiana decisions. In *Mutual Mfg. Co.* v. *Alspaugh*, 174 Ind. 381, 91 N. E. 504, the Supreme Court of Indiana had held that the mere solicitation of business by a foreign corporation in Indiana, even by sending its full time employees into the State, did not constitute the doing of business in Indiana within the meaning of its service of process statutes. The citator shows that that case has not been departed from.

In *Travis* v. *Fuqua*, 121 Ind. App. 440, 97 N. E. (2d) 867, the Appellate Court of Indiana in 1951 construed Sec. 2-703, Ind. Stat., Burns 1947 Repl., providing that service may be upon a corporation where it has an office for transaction of business. Because the bus tickets had been bought in Evansville, Indiana, the bus passenger of the foreign corporation, a Kentucky bus company, sought to sue in Indiana on account of injuries sustained in his ride in Kentucky. The sale of tickets by the connecting line in Evansville was held not to bring the foreign corporation within the statute. The *International Shoe* case was distinguished.

In *General American Life Ins. Co.* v. *Carter*, 222 Ind. 557, 54 N. E. (2d) 944, app. dismissed, 323 U. S. 676, the Su-

preme Court of Indiana construed an Indiana statute respecting service of process upon insurance companies by serving the Insurance Commissioner. The foreign insurance corporation by qualification in Indiana had consented thereto. However, since the plaintiff was a resident of Mississippi and since the policy was not purchased in Indiana, the Court reversed a judgment for the plaintiff, saying (947):

> "* * * It must be assumed that the statute was enacted with the purpose of serving some interest of the state or its inhabitants. There could be no possible interest in the importation of actions entered into in other jurisdictions between the insurance company and non-residents of the state. It is reasonable to conclude that the intent and design was to bring the insurance company within the jurisdiction of the courts of the state for the purpose of actions arising out of contracts made within the state or with residents of the state. Since this seems the obvious purpose of the statute, it 'ought not to be construed to impose upon the courts of the State the duty, or to give them power, to take cases arising out of transactions so foreign to its interests.' "

When such a statute is thus construed not to relate to transitory causes of action arising in other jurisdictions between non-residents, it seems clear that Sec. 25-316 is not applicable in the present case when even there was no qualification and no consent, when the plaintiff, a citizen and resident of Illinois (Rec. 3) sued in Indiana the defendant corporations of other States upon a cause of action arising outside of Indiana, and when Sec. 25-316 expressly limits its application to causes of action "arising or growing out of, directly or indirectly, any act or thing done by such corporation within the State of Indiana."

The purpose and interpretation of such statutes providing for service upon foreign corporations by service upon the Secretary of State are stated by Judge Parker in his

opinion in *Knott Corporation* v. *Furman,* 163 F. (2d) 199 (C. A. 4) wherein he quoted from 23 American Jurisprudence, page 512, as follows (203):

> "Upon the theory of implied consent, by entering the state and engaging in business therein without first qualifying under the valid local laws, which provide for service on a statutory agent, or complying with a lawful requirement that it designate some person of its own selection or a prescribed state official as its agent to receive service of process in suits against it, such a corporation may be deemed to have consented that jurisdiction of the local courts over it while thus engaged may be acquired through service upon its agent in charge of such business, whom it is deemed to have designated for the purpose, or upon the prescribed state official as the case may be, in all suits arising out of such business, *although not in suits on foreign transitory causes of action unconnected with the corporation's business in the state, where jurisdiction is sought to be rested on service made upon a state officer or other person whose authority to receive process is derived exclusively from statute, unaided by any representative relation to the corporation.*" (Italics ours.)

We respectfully contend that the Indiana statute (Sec. 25-316) and the Indiana decisions clearly indicate that foreign transitory causes of action unconnected with any business done in Indiana are not covered by said statute. As we have pointed out, the petitioner has cited no Indiana decision to the contrary.

In *Coakley* v. *Frank A. Munsey Co.,* 50 F. Supp. 83, Judge Wyzanski considered a statute of Massachusetts (Mass. Gen. Laws, Ter. Ed., c. 181, Sec. 3A), which provided (85):

> "* * * a foreign 'corporation which does business in this commonwealth * * * shall * * * be deemed and held, *in relation to any cause of action* or proceeding *arising out of such business,* to have appointed the commissioner * * * to be its attorney,

and any process in such action or proceeding against it served upon the commissioner * * * shall be of the same legal force and validity as if served'."

Judge Wyzanski said (85):

"* * * it is transparent that the cause of action [for libel] did not arise out of defendant's Massachusetts business. It arose out of defendant's activities such as its editorial work, its printing and its contracts for distribution of periodicals, all of which occurred outside of Massachusetts. In this state defendant did nothing but solicit and receive offers for advertising contracts. Since the present cause of action has nothing whatsoever to do with such advertising business, the service of process upon the Commissioner was not authorized by the terms of Mass. G. L. (Ter. Ed.) C. 181, Sec. 3A."

Whether one examines the first few lines of Sec. 25-316 of the Indiana statute, the "engaging in any transaction or the doing of any business in this state," or the lines further along in the section, "arising or growing out of, directly or indirectly, any act or thing done by such corporation within the State of Indiana," in neither event did the statute contemplate service upon The Reader's Digest Association, Inc. under the circumstances of this case.

Petitioner's failure to meet the construction of Sec. 25-316 and his failure to cite a single Indiana decision or any decision relating to that statute or to similar statutes amount to an implied concession of the correctness of the order of dismissal.

The Community Representatives.

210 F. (2d) 908, 915:

"It is not contended that Reader's Digest was doing business in Indiana through the store and newsstand sales of its magazine, nor through the mailing of its magazine to Indiana subscribers. It is only the activity of the so-called community representatives which,

it is said, constitutes such 'doing business' as to make Reader's Digest amenable to service of process in Indiana."

The petition is devoted to argument upon the packet and papers of the "pin money boys and girls," which packet the plaintiff's attorney wrote for and of course obtained, when advertised before Christmas of 1952.

The advertising shows that it was primarily for the period of Christmas, 1952, and made the same offer to everyone whomsoever. There was not the slightest selection of personnel. Anyone who could sign his name and remember his address got the material and became a so-called "representative," who could take subscriptions. Everyone has had the experience of door-bell ringing by boys and girls seeking subscriptions to magazines.

He would collect the subscription price, deduct his own share, and transmit the balance to Reader's Digest Association, Inc. It was within his power to get cut rates for himself and his friends. No one supervised anything.

There was no employee of Reader's Digest Association, Inc., who selected him, there was no employee who helped him, who ever saw him, or who gave him any directions.

The foregoing merely adopted the general form of circulation device which has been followed by national magazines for many years, through local stores and distributors, through clubbing combinations of magazines, or other means.

With no selection, with no supervision and direction, and with no pay, these representatives were not agents in any actual sense but were independent contractors. Certainly no one would contend that Reader's Digest would be liable for social security, for personal injuries caused by them or to them, for expenses incurred or for supplies bought.

No Indiana authority and no authority anywhere is cited to show that any court has held a foreign publishing company to be doing business in the sense of such a service of process statute, in conducting such circulation activity.

In each of the following cases there was an issue upon some phase of process statutes as to what activities constituted the doing of business.

Whitaker v. *MacFadden Publications, Inc.,* 105 F. (2d) 44 (C. A. D. C.). In that case, a boss and a sales crew went into the District of Columbia as paid employees to supervise and to promote sales by the publishing company's vendees in the District. Service was made by serving the boss of the crew. It wasn't good, under District of Columbia law. In that case, however, it wasn't the "pin money boys and girls" who were involved but actual paid employees of the circulation department.

Cannon v. *Time, Inc.,* 115 F. (2d) 423 (CA 4). The foreign corporation, Time, Inc., sold to a local news company, which in turn sold to local newsstands and stores and supervised collection of subscriptions. The Court, by Judge Parker, said (425):

> "Even if the News Company be considered the agent of defendants in accepting and collecting for subscriptions, it does not follow that the defendant should be held present and doing business within the State. Mere solicitation of business by an agent does not constitute such a doing of business as to subject a foreign corporation to the local jurisdiction; and the situation is not changed by the fact that the agent may collect some money in connection with the business solicited. * * * The custom of magazines to offer premiums and other compensation to persons procuring paid subscriptions for them is one of long standing; and it has never been supposed that the obtaining of subscriptions in this way brought the magazines within the jurisdiction of the State any more than the obtaining of such subscriptions through the mails."

If one looks at what was actually done here, no difference will be seen between the independent contractor relationship in that case and in the relationship here. The present arrangement was even devoid of anything whatever that was personal. As for sending "contracts" to the home office "for acceptance," that is an attempted distinction without any difference, for it may be presumed that exceedingly extraordinary conditions would exist if ever a magazine publishing company refused a subscription when the money was attached.

In *Street & Smith Publications* v. *Spikes,* 120 F. (2d) 895 (C. A. 5), the magazine publisher sold its magazine to a local distributor in Texas who resold to stores and to stands. The contract required the distributor to keep the periodicals moving, copies returned to the distributor to be destroyed, contract to be terminated unless distributor did a satisfactory job. The court held that it did not constitute the doing of business in the local jurisdiction by the magazine publisher.

In *Kriger* v. *MacFadden Publications,* 38 F. Supp. 472 (Distr. Md.), the publishers shipped magazines to a news company in Baltimore which gave office space to paid employees of the publisher who were engaged in sales promotion. It was held not to constitute the doing of business so as to subject the publisher to service of process in Maryland.

We doubt that the petitioner would actually contend that every national magazine is doing business for purposes of service of process in each of the 48 States, and that the Illinois plaintiff could bring his libel suit in any or in all. And yet, carried to its logical conclusion, such would seem to be the result of appellant's argument.

The Due Process Cases.

The Court of Appeals concluded (210 F. (2d) 908, 916):

> "Whether the question is one of due process, or state law, we think the District Court correctly decided the question on the principles announced in *Cannon* v. *Time, Inc.*, 4 Cir. 115 F. (2d) 423."

As we have pointed out, that is slightly different from the decision by the District Court for the Northern District of Indiana, wherein Judge Swygert made it clear the question being decided by him was "collateral to the due process question" (R. 64).

Judge Swygert's decision was upon Indiana law. The Court of Appeals made its decision *both* upon Indiana law and upon Due Process, considering that the only issue was with respect to the community representatives and that they were independent contractors.

Inasmuch as there are two clear points in the present case, prior to reaching the Due Process point, we refer to it only briefly.

In *International Shoe Co.* v. *Washington*, 326 U. S. 310, the holding was that the Delaware corporation had brought itself within the statutes of Washington providing for service of process, in a suit to collect payments due to the Washington Unemployment fund, because of the fact that the corporation's employees on account of whom the payments were sought had been sent to Washington and resided there. The result was held not to violate due process.

A distinction, in addition to the fact that the statute is substantially different from the Indiana statute, is that there were regular employees of the Shoe Company in Washington and that such activities were "continuous and systematic." There were no employees of Reader's Digest in Indiana.

Furthermore, the *Shoe Company* opinion gives weight to principle of *forum non conveniens.* In the present case, no reason is suggested why the case should have been brought in Indiana.

Relative to *forum non conveniens* we quote from the opinion in the *Shoe Company* case (316):

> "* * * the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. L. Hand, *J.* in *Hutchinson* v. *Chase & Gilbert,* 45 F. 2d 139, 141. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection. *Hutchinson* v. *Chase & Gilbert, supra,* 141."

Judge Learned Hand's later exposition in *Latimer* v. *S/A Industrias,* 175 F. (2d) 184 (C. A. 2) is interesting (185-6):

> "In *Hutchinson* v. *Chase & Gilbert,* we had occasion to consider the meaning of the word 'presence', * * * [it] demands more than that the local activities shall be continuous and not sporadic; it includes as a second factor an 'estimate of the inconveniences which would result from requiring' the corporation 'to defend, where it has been sued.' * * * In *International Shoe Company* v. *Washington,* the Supreme Court adopted this approach; it said that * * * 'An "estimate of the inconveniences" which would result to the corporation * * * is relevant in this connection.' This language meant that constitutionally it was not enough to hold a corporation that it did some continuous business within the state of the forum; the injustice might be too great, if it were compelled to stand trial there merely on that account, and regardless of all attending

> 'inconveniences'. This was what we have called the second factor in 'presence', and in *Kilpatrick* v. *Texas & Pacific Ry. Co.*, we said that the issues involved in this second factor, so far as we could see, were indistinguishable from those which determined a plea, forum *non conveniens* • • • whatever will support the plea will excuse the corporation from defending the suit."

Why was this suit brought in Indiana? The plaintiff resided in Illinois (Rec. 3). The Reader's Digest Association, Inc. was a New York corporation with no office in Indiana. Tucker Corporation was a Delaware corporation with no office anywhere at that time. It had tried to manufacture automobiles in Illinois and was in bankruptcy reorganization in Illinois. The magazine was not published, printed, or mailed in Indiana. Under the doctrine of *forum non conveniens* the action would scarcely have been maintainable there. *Gulf Oil Corporation* v. *Gilbert*, 330 U. S. 501; *Koster* v. *Lumberman's Mutual Co.*, 330 U. S. 518. As a matter of fact, the plaintiff had actually sued the same defendants upon the same cause of action, in Illinois. *Schmidt* v. *The Reader's Digest Association, Inc.*, 349 Ill. App. 252.

Petitioner relies upon *Consolidated Cosmetics* v. *D-A Pub. Co.*, 186 F. (2d) 906 (CA 7) which was also presented as a due process case. The service was in accordance with an Illinois statute (Ch. 110, Sec. 141) which did not contain the limitations to be found in the Indiana statute. The only issue was whether the service in accordance with the Illinois statute violated the Fourteenth Amendment. As the Court said (908):

> "Here the New York corporation had made Mount Morris, Illinois its place of publication in order to qualify with the postal department for mailing second class matter. It stored merchandise with its contractor, Kable, in Illinois, including paper and other materials to be used in printing the magazines. It sent to Kable drawings, reading matter, photographs and engravings, and employed Kable and thereby authorized it to

set up the copy and to print the magazines in completed form. It contracted with and thereby authorized Kable from time to time, as the magazines were printed, to wrap them, to address them to *defendant's* consignees and to deposit them in the mail addressed to such consignees. These activities were not casual, isolated or disconnected but continuous and connected in plan and series."

The distinctions between that case and this are (1) that the Reader's Digest was not made up, printed, or mailed in the State of Indiana, and (2) the service there complied with the statute of Illinois whereas the service here does not comply with the law of Indiana.

Petitioner cites *Real Silk Hosiery Mills v. Philadelphia, etc., Co.*, 46 F. (2d) 25 (CA 3). The facts in the *Real Silk* case were very different from the present case. The corporation itself maintained an office within the State with a branch sales manager and other full-time employees who instructed and gave directions to the salesmen and saleswomen, who themselves were not engaged in casual employment but who worked full time, and who carried a full line of merchandise. There was nothing in the case (as there is nothing in any decision), indicating that the mere activity of boys or girls contacted merely through the mail and soliciting subscriptions upon the basis of a form letter, as here, constitutes the doing of business for purposes of service statutes.

Conclusion.

1. Wholly irrespective of petitioner's argument of inadequacy of service, the dismissal of the action by the District Court was clearly correct because the complaint failed to state a cause of action upon which relief can be granted, and the District Court so found. Indeed, the petitioner charges no error in that conclusion.

2. Irrespective of any question of Due Process of Law, the dismissal of the action by the District Court was clearly correct because Sec. 25-316 was expressly limited to foreign corporations engaging in any transactions or the doing of any business in Indiana, and because under Indiana law the "community representatives" did not constitute such transaction or business. Furthermore, the dismissal was clearly correct because Sec. 25-316 was expressly limited to actions arising or growing out of, directly or indirectly, any act or thing done by such corporation within the State of Indiana, and because under Indiana law this cause of action did not arise or grow out of, directly or indirectly, any act or thing done within the State of Indiana.

3. Furthermore, that if The Reader's Digest Association, Inc. *had been* held to be reached by Sec. 25-316, in such event the "community representatives" would not have constituted sufficient contact, under the Fourteenth Amendment, particularly in a cause of action between non-residents which arose elsewhere.

WHEREFORE, it is respectfully submitted that the order of dismissal was clearly correct.

Respectfully submitted,

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